

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 081254

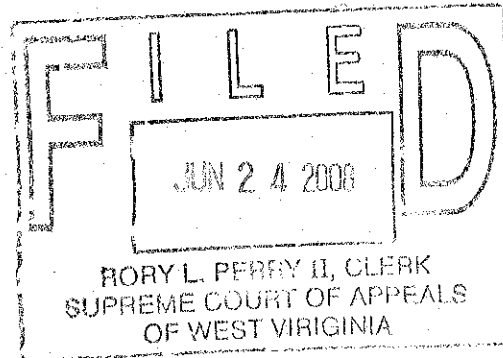
CITIFINANCIAL, INC.,

Petitioner,

v.

PAUL W. LIGHTNER,

Respondent.



AMICUS CURIAE BREIF OF WEST VIRGINIA INSURANCE COMMISSIONER

Respectfully submitted,

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MEMORANDUM OF PARTIES

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TABLE OF CASES AND AUTHORITIES

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**BRIEF AMICUS CURIAE OF THE WEST VIRGINIA
INSURANCE COMMISSIONER IN SUPPORT OF
PETITIONER CITIFINANCIAL, INC.'S
VERIFIED PETITION FOR WRIT OF PROHIBITION**

I. INTERESTS IN AMICUS CURIAE

The “Insurance Commissioner of West Virginia” (referred to herein as the Offices of the Insurance Commissioner, or “OIC”) is the state agency charged by the Legislature, pursuant to Chapter Thirty-Three of the West Virginia Code to regulate the insurance industry and its activities in West Virginia and to otherwise enforce the provisions of the insurance code. This includes the regulation of credit insurance. *See*, W. Va. Code § 33-1-10, 114 CSR § 6-1, *et seq.*, and 114 CSR § 61-1 *et seq.*, among others. The OIC’s regulation includes, among other things, the licensing of insurers transacting insurance in this state (*See*, W. Va. Code § 33-3-1, *et seq.*); the approval of all forms used by an insurer in this state (*See*, W. Va. Code § 33-6-9); the examination and oversight of the financial status of insurers and overall authority to review any phase of the operations of the insurer in the state (*See*, W. Va. Code § 33-2-9); the approval of rates charged by an insurer in this state (*See*, W. Va. Code § 33-20-1, *et seq.*); and licensing of producers doing business in this state (*See*, W. Va. Code § 33-12-1, *et seq.*). The Insurance Commissioner is appointed by the Governor by and with the advice and consent of the Senate. *See*, W. Va. Code § 33-2-1.

II. KIND OF PROCEEDING

Upon information and belief, the instant case was filed under the West Virginia Consumer Credit Protection Act (the “WVCCPA”). *See*, W. Va. Code § 46A-1-1, *et seq.* This Act specifically recognizes the role of the OIC in establishing premium rates for credit insurance

and in developing rules to implement the provisions of the WVCCPA relating to credit insurance. *See*, W.Va. Code § 46A-3-109(b)(3) and W. Va. Code § 46A-3-109(c).

This brief amicus curiae is filed for the limited purpose of discussing the role of the OIC in establishing premium rates for credit insurance and the relationship between the OIC's role in approving rates and the body of law found in the WVCCPA. It is not the intention of the OIC to comment upon the facts of the underlying dispute or arguments of the parties. Rather, the OIC simply wishes to remind the Court of its statutory role and to discuss the Legislature's intent in enacting the very comprehensive regulatory system for the insurance industry that exists in Chapter Thirty-Three of the West Virginia Code.

III. LEGAL ARGUMENT

Upon information and belief, the factual premise upon which this Petition is based involves a claim under the WVCCPA alleging that the Petitioner charged excessive rates for credit insurance purchased by the Respondent in connection with two loans that were obtained from the Petitioner. Upon further information and belief, the premium rates for this credit insurance were approved by the OIC prior to the appointment of the current Insurance Commissioner. Other than the instant case, the OIC is unaware of any action that has been brought to challenge those rates. Based upon pleadings that have been provided to the OIC, the Petitioner serves not only as the lender, but also as the producer for the insurers that offered this credit insurance in West Virginia. OIC records do not indicate that the Respondent has elected to challenge these rates before the Insurance Commissioner.

A. The Offices of the Insurance Commissioner has Primary and Exclusive Jurisdiction to Determine The Reasonableness of Rates Charged by an Insurer.

The OIC is the state agency charged with regulating the insurance industry through the enforcement of Chapter Thirty-Three of the West Virginia Code. *See*, W. Va. Code § 33-2-3(a). Among its many other statutory duties, the OIC regulates credit insurance, which is a defined type of casualty insurance under West Virginia Code Section 33-1-10(e). Among other powers, the Legislature has delegated to the Commissioner the exclusive power to determine whether premium rates to be charged West Virginia consumers by insurers are reasonable and whether insurance forms used by an insurer conform to the requirements of Chapter Thirty-Three of the West Virginia Code. *See*, W.Va. Code § 33-20-3(a) and (b), and W.Va. Code § 33-6-8.

The authority to regulate the insurance industry is exclusive to the OIC. It is clear that Chapter Thirty-Three was enacted by the Legislature with the intent of making the insurance industry a heavily and separately regulated industry, which is to be isolated from the rest of the business world in regard to government regulation, and to be regulated solely by the OIC. Specifically, the Insurance Code gives the OIC the power to license and regulate all types of insurance-related businesses, including insurers, producers, agencies, third party administrators, health maintenance organizations, hospital, medical and dental corporations ("Blues" plans), etc.¹

The Legislature, in enacting the Insurance Code, recognized that the insurance industry is different in many aspects from other types of businesses and industries, and therefore needs to be

¹ Proof that the Legislature believes the OIC capable of providing meaningful oversight is illustrated by the fact that the Legislature recently added to the OIC's regulatory duties by enacting three new pieces of legislation during the 2008 regular session. One bill, H.B. 4079, requires the OIC to license and regulate Professional Employer Organizations ("PEO's"); a second bill, S.B. 704, requires the OIC to license and regulate viatical settlement providers and brokers; and a third bill, H.B. 4404, requires the OIC to license and regulate medical discount plans.

regulated in a different manner. Chapter Thirty-Three is a comprehensive system of regulation that is primary in relation to other state regulatory agencies. For example, under W.Va. Code § 33-3-3, the Secretary of State is not permitted to issue a certificate of incorporation to an insurance company until the Insurance Commissioner has examined and approved the charter of such insurer. Further, under W. Va. Code § 33-3-7, a foreign insurer that obtains a license to conduct insurance business in West Virginia is exempt from being required to obtain a certificate of authority from the Secretary of State, which would otherwise be required under West Virginia law for any other type of foreign (out of state) business doing business in West Virginia.²

In addition to the authority to approve or disapprove applications for licenses from regulated entities, and to suspend or revoke those licenses under appropriate circumstances, the OIC has specific statutory authority to regulate and approve rates charged by insurers and the forms that insurers use in our State. *See*, W. Va. Code § 33-20-4 and W. Va. Code § 33-6-8. The OIC is further authorized to perform financial and market conduct examinations to ensure that regulated entities are financially sound and capable of paying claims as they come due, as well as ensuring that they are operating in compliance with all statutes, rules and orders of the OIC. *See*, W. Va. Code § 33-2-9. In carrying out these highly technical and specialized duties, the Insurance Commissioner relies on her staff of lawyers, accountants (who must be fluent with principles of statutory accounting), rate and form analysts, actuaries, market conduct investigators, and other individuals with the necessary knowledge and expertise to perform these functions. The OIC clearly has the resources to engage in the type of detailed analysis needed to

² In *Fidelity Mutual v. Sims*, 140 W. Va. 49, 82 S.E.2d 312 (1954), the Court stated that "insurance companies . . . are extensively regulated by the pertinent statutes contained in West Virginia Code Chapter Thirty-Three." Based on that statement, the Court held that foreign insurance companies are exempt from West Virginia statutes which generally apply to other "non-insurance" foreign corporations.

approve rates, which is why it is critical for the Insurance Commissioner to have exclusive authority to determine if rates are reasonable in relation to benefits offered.

The Legislature recognized that individuals may have concerns about the reasonableness of premium rates and has established a remedy to address those concerns. West Virginia Code Section 33-20-5(d) provides that any person or organization aggrieved with respect to any rate filing which is in effect may demand a hearing on the filing. A person who has concerns about the reasonableness or excessiveness of rates may avail him- or herself of this process. If, after notice and a hearing, the Commissioner determines that the rate filing fails to meet the requirements of Article Twenty, Chapter Thirty-Three of the West Virginia Code, the rates are no longer effective. This provision is part and parcel of the Legislature's broad regulatory outline of the OIC's authority under Chapter Thirty-Three of the West Virginia Code. If the Legislature has designated the OIC as the exclusive state regulator over the insurance industry, imbued with the authority to approve or disapprove rates for insurance products sold in our state, then it only stands to reason that the OIC would be the appropriate venue for bringing forth any concerns about the reasonableness of those rates.

B. The West Virginia Consumer Credit Protection Act affirms that the Commissioner has exclusive authority to approve rates

The WVCCPA also addresses the rates that may be charged for credit insurance. The WVCCPA reaffirms that the Commissioner has the exclusive authority to determine the reasonableness of these rates. The WVCCPA provides that a lender is authorized to charge a debtor for insurance if the charges are reasonable in relation to the benefits offered. *See*, W. Va. Code 46A-3-109(a)(4). In determining what is reasonable, the WVCCPA defers to the actions of the OIC in approving rates. "The premium or identifiable charge for the insurance required or

obtained by a creditor may equal, but may not exceed the premium rate filed by the insurer with the Insurance Commissioner.” *See*, W. Va. Code § 46A-3-109(b)(3).

Further, the WVCCPA recognizes that the Commissioner is given exclusive jurisdiction to promulgate rules to implement the WVCCPA as it relates to insurance. *See*, W. Va. Code § 46A-3-109(c).

C. **The actions of the Circuit Court will have serious adverse consequences for the West Virginia insurance market**

The Insurance Commissioner has concerns about this case and its implications for the West Virginia insurance market. The underlying case is not only contrary to the express statutory scheme which designates the OIC as having exclusive authority to review and approve rates and forms, but if not reversed, could have serious negative consequences on the state’s insurance market. It is in the best interests of this State and its citizens to have a stable insurance market. In a stable market, insurers are more likely to write insurance, resulting in more choices and lower premiums for consumers.

Insurance is one of the most highly regulated industries. Every aspect of an insurer’s activity is subject to regulation by the Commissioner. In order for there to be a stable insurance market, there must be predictability and consistency. Further, an insurer must be able to rely on actions and decisions of the OIC. It is very difficult for business to be conducted in an environment where a regulated entity is uncertain of whether an activity that has been specifically approved by the statutory regulator will be later disapproved by another government entity. An insurer should not be subject to unnecessary lawsuits collaterally challenging the rates that the OIC has already approved in accordance with statutory requirements.

The Legislature has recognized the importance of a stable insurance market in addressing the *Mitchell v. Broadnax*, 537 S.E.2d 882 (W. Va. 2000) case. In 2000, the West Virginia Supreme Court rendered a decision that put into question the enforceability of exclusionary provisions contained in property and casualty insurance policies. To the extent that certain exclusionary provisions were deemed unenforceable, an insurer faced greater liability and risk than the rates which had been approved by the Commissioner.

The Legislature recognized this problem and passed legislation in 2002 to address it. The Legislature found "that actions seeking premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the Insurance Commissioner's forms used and the rates charged insurers," and "that it is in the best interests of the citizens of this state to ensure a stable insurance market." See, W. Va. Code § 33-6-30(b)(6) and (7). (Emphasis added.) Based on these findings, the Legislature concluded:

Where any insurance policy form, including any endorsement thereto, has been approved by the Commissioner and the corresponding rate has been approved by the Commissioner, there is a presumption that the policy forms and rate structures are in full compliance with the requirements of this chapter.

See, W. Va. Code § 33-6-30(c).

The actions of the Legislature are consistent with other actions taken by the Legislature through the efforts of the Governor and the OIC. During the first few years of the Insurance Commissioner's tenure, insurance rates for auto and homeowners coverages were substantially higher than our neighboring states and the number of insurers willing to write new policies continued to decline. The insurer with the largest market share in our state had placed a moratorium on new personal lines business here. We were approaching a crisis situation in West Virginia in both commercial and personal lines property and casualty insurance markets. Some

business owners were forced to look to surplus lines carriers for certain coverages that were simply not available in our state from admitted insurers. The OIC took actions to protect these businesses in early 2004 by proposing amendments to the Surplus Lines Rule, found at 114 CSR 20.

As a direct result of legislation introduced by the Governor and the Insurance Commissioner to address this crunch on West Virginia consumers, the market here has improved dramatically. Premium rates have decreased and the number of insurers writing auto and homeowners insurance continues to increase. In addition, insurers are offering new products to meet the changing needs of our citizens, and they are once again writing new business. As a result of legislation passed during this period, the market has improved significantly.³ The legislative changes helped stabilize the West Virginia property and casualty insurance market, reduced the number of unnecessary lawsuits filed against insurers, allowed insurers to better determine their level of risk for insurance they have offered, reduced premium rates, and increased the number of insurers providing these coverages.

As relates to the instant case, this collateral attack on rates that have been approved by the Commissioner could have implications beyond credit insurance. It only stands to reason that insurers will be less willing to offer coverage in a jurisdiction where they cannot rely on the actions and approvals of the Insurance Commissioner, particularly if the actions of the

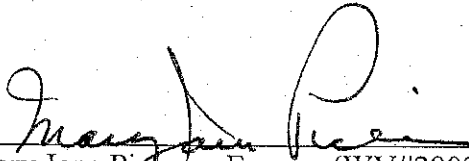
³ The elimination of private third party causes of action under the Unfair Claims Practice Act (W. Va. Code § 330-11-4a); the clarification of the law that was expressed in *Mitchell v. Broadnax*, 537 S.E.2d, 882 (W. Va. 2000); the allowance of insurers to use an alternative method for determining policies to nonrenew in both auto and homeowners' insurance (W. Va. Code § 33-17A-5 and W. Va. Code § 33-6A-4, 4a and 4b, respectively) have all contributed to a better insurance environment for consumers. The success of these insurance reforms is illustrated in part by OIC data showing that for insurers that elected to nonrenew automobile policies under the 2004 legislation allowing the alternative nonrenewal method, nonrenewals actually decreased 23% between 2005 and 2006.

Commissioner can be collaterally challenged. Not only is this contrary to law, it is bad public policy for the citizens of West Virginia.

IV. CONCLUSION

For the foregoing reasons, the Insurance Commissioner respectfully requests that the Court find that the Insurance Commissioner of West Virginia has exclusive jurisdiction to establish premium rates for credit insurance and that any challenge to the reasonableness of those rates may only be made with the Insurance Commissioner through the statutory avenues clearly laid out in the Insurance Code.

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CERTIFICATE OF SERVICE

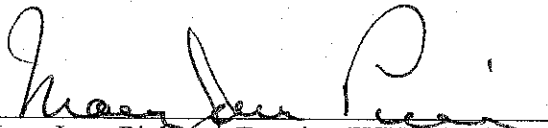
I, Mary Jane Pickens, Esquire, counsel for the West Virginia Insurance Commissioner, do hereby certify that I served the foregoing, "**Amicus Curiae Brief**" upon the following counsel of record by depositing the same in the United States Mail, first class and postage pre-paid this 24th day of June, 2008:

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